METHODS OF JUDICIAL REVIEW IN RELATION TO THE EFFECTIVENESS OF COMMISSION CONTROL

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The effectiveness of the control of municipal public utilities by state commissions is determined by the thoroughness of their findings, the justice of their rulings and the extent to which the proceedings and orders of the commissions are sustained by the courts or made final and conclusive by statutory enactments. While the strength of commission findings and the validity of the orders issued thereon depend upon the scope and accuracy of their investigations and the integrity of their rulings, the force and effect of commission control depend ultimately upon the authority conferred on the commissions by the legislatures in the first instance and the extent to which action by commissions is made conclusive of the controversy. The right of review or appeal to the courts from the proceedings of commissions limits and defines the sphere of their efficiency and determines the extent to which the courts may supplant, modify or set aside the action of commissions; thereby making their findings and orders conditional and qualified, and not absolute and final.

After an investigation of the facts on due notice, usually of not less than ten days, and a public hearing, the proceedings of the commission have been concluded and disposed of with an order or regulation, an interested party may generally apply to the commission for a rehearing because of additional evidence, changed conditions or errors and omissions in its original proceedings. The time within which a petition for rehearing may be filed is limited by statute in Ohio to thirty days,[1] and in Pennsylvania to fifteen days;[2] while in Illinois only one rehearing may be granted, which, however, does not prevent any party after two years from again applying to the commission upon a new and different state of facts,[3] and in

[1] *Laws 1911*, p. 549, sec. 45.

[2] *Laws 1913*, no. 854, art. VI, sec. 14.

[3] *Laws 1913*, p. 459, sec. 67.

Washington any public service corporation, being affected and aggrieved by any order of the commission, may after two years file a petition for rehearing, and in cases where the order has not been reviewed by the court but complied with by the company, the petition may be filed within six months.[4] An application for rehearing, which must specifically set forth the reasons therefor and be filed within a month, if not before the order takes effect, is frequently made a condition precedent to judicial review as in New Hampshire,[5] Missouri,[6] Ohio[7] and California.[8]

The commission may exercise its own discretion in granting a rehearing or dismissing the petition, and on a rehearing may in its discretion sustain, modify, or revoke its original action. The time within which a petition for rehearing shall be determined by the commission is fixed by statute in some states, being limited to thirty days after the same is finally submitted in Idaho,[9] Missouri,[10] and New York.[11] And it is sometimes expressly provided that no legal proceeding to contest any order or regulation of the commission can be taken until it acts upon an application for a hearing as in Illinois[12] and Nebraska.[13]

While the commission has authority to make summary investigations they are generally supplemented later by formal hearings on due notice, if in the opinion of the commission sufficient ground exists to justify a further hearing, in which case it may be granted on motion of the commission itself or upon application by an interested party, as provided by statute in Indiana,[14] Oregon,[15] Maine,[16] Wisconsin[17] and in the District of Columbia.[18]

[4] *Laws 1911*, c. 117, sec. 89, as amended 1913, c. 145.
[5] *Laws 1913*, c. 145, sec. 18.
[6] *Laws 1913*, p. 556, sec. 110.
[7] *Laws 1911*, p. 549, sec. 32.
[8] *Stats. 1911*, 1st ex. sess., c. 14, sec. 66.
[9] *Laws 1913*, c. 61, sec. 62.
[10] *Laws 1913*, p. 556, sec. 110.
[11] *Laws 1910*, c. 480, pub. ser. com. law sec. 22.
[12] *Laws 1913*, p. 459, sec. 68.
[13] *Stats. 1911*, sec. 10655.
[14] *Acts 1913*, c. 76, sec. 62.
[15] *Laws 1911*, c. 279, sec. 10.
[16] *Laws 1913*, c. 129, sec. 46, pending on referendum.
[17] *Stats. 1911*, sec. 1797 M-7.
[18] Appropriation act, March 4, 1913, sec. 9, par. 45.

Ample provision is made for a full and thorough investigation of all material facts after notice to interested parties and a complete public hearing in connection with practically all proceedings of any commission, which serves as the basis of the findings and orders or regulations in the forty or more jurisdictions which now have commissions. The commissions are created for the sole and express purpose of making such investigations and issuing the proper orders thereon. The members of the commissions are selected and trained especially for this service to which they devote their exclusive time and attention. They are peculiarly fitted for such work and their findings and orders are very properly and necessarily presumed to be reasonable, lawful and correct. The burden of proof is placed on the party attacking their action and unless the weight of evidence is clearly against the findings of the commission they will be sustained and their orders enforced on appeal to the courts, unless they are clearly illegal.

By statute in California the findings and conclusions of the commission on question of fact are properly made final and not subject to judicial review; and it is provided that questions of fact shall include ultimate facts and the findings and conclusions of the commission on reasonableness and discrimination.[19] In Colorado it is provided that the findings and conclusions of the commission on disputed questions of fact shall be final and shall not be subject to review by the courts.[20] The statutory provisions of Idaho make the findings and conclusions of the commission on questions of fact *prima facie* just, reasonable and correct; such questions of fact to include ultimate facts and the findings and conclusions of the commission on reasonableness and discrimination.[21] In Illinois the statute provides that the findings and conclusions of the commission on questions of fact shall be *prima facie* true, and their rules, regulations, orders or decisions *prima facie* reasonable; thereby shifting the burden of proof on all issues, as is done in practically all other states, upon the party appealing therefrom.[22] The New Hamsphire statute provides that all findings of the commission upon all questions of fact properly brought before it shall be *prima facie* lawful and rea-

[19] *Stats. 1911*, 1st ex. sess., c. 14, sec. 67.
[20] *Laws 1913*, c. 127, sec. 52.
[21] *Laws 1913*, c. 61, sec. 63.
[22] *Laws 1913*, p. 459, sec. 68.

sonable.[23] And in Pennsylvania the orders of the commission are made *prima facie* evidence of their reasonableness.[24]

Within a limited time, usually thirty days, after the final action of the commission, appeal therefrom lies to the county or district court where the matter in question arose, to such courts having jurisdiction where the commission sits or to the supreme or the court of last resort in the state. Appeals may be taken only within thirty days and directly to the supreme court in the state of California, where on review the court may only determine whether the commission has regularly pursued its authority and whether the order or decision being reviewed violates any constitutional right of the petitioner; and the judgment of the supreme court must either affirm or set aside the order or decision of the commission.[25] In Colorado the right of appeal is likewise limited to the supreme court which has authority in addition to that granted the California court to determine whether the order of the commission is just and reasonable and whether its conclusions are in accordance with the evidence, and the court may affirm, set aside or modify the order or decision of the commission.[26] Similar provisions for review on *certiorari* by the supreme court are made by the statutes of Idaho where, however, the judgment of the court must either affirm or set aside the action of the commissions.[27] In Maine the right of appeal is expressly limited to a decision by the supreme court on questions of law, submitted on an agreed statement of facts or on facts found by the commission which together with copies of the arguments of counsel must be filed with the court.[28] The supreme judicial court of Massachusetts is given jurisdiction in equity to review, annul, modify or amend rulings and orders of the commission in so far as they are unlawful.[29]

Any party affected and dissatisfied with the action of the commission in Nebraska may resort to the supreme court which may reverse, vacate, or modify such action.[30] In New Hampshire provi-

[23] *Laws 1913*, c. 145, sec. 18.
[24] *Laws 1913*, no. 854, art. VI, sec. 23.
[25] *Stats. 1911*, 1st ex. sess., c. 14, sec. 67.
[26] *Laws 1913*, c. 127, sec. 52.
[27] *Laws 1913*, c. 61, sec. 63.
[28] *Laws 1913*, c. 129, sec. 53, pending on referendum.
[29] *Acts 1913*, c. 784, sec. 27.
[30] *Stats. 1911*, sec. 10655.

sion is made for appeal direct to the supreme court which shall not set aside the order or decision of the commission except for errors of law unless the court is clearly satisfied under the evidence that the order is unjust and unreasonable, when in its judgment the court must dismiss the appeal or vacate the order in whole or in part, in which case the matter may be remanded to the commission for such further proceedings not inconsistent with the judgment, as in the opinion of the commission justice may require.[31] Review of the proceedings of the commission by the supreme court alone is also provided for in New Jersey,[32] New Mexico,[33] Ohio,[34] Oklahoma,[35] Rhode Island,[36] Vermont,[37] Virginia,[38] and in West Virginia.[39]

Within fifteen days after final action by the Connecticut commission, which it may extend to thirty days, an appeal lies to the superior court of the county in which the matter arose, or if the question is not local, to the court of Hartford County, the seat of the commission. The decision of this local court is made conclusive, subject to review by the supreme court of errors on questions of law.[40] In Georgia the court of Fulton County, the domicile of the commission, is given exclusive jurisdiction of appeals, except that the supreme court may be resorted to in enforcing penalties[41] as also in Alabama[42] and Arizona where the judgment of the local court is final unless notice of appeal therefrom is given at the time judgment is entered.[43] Within thirty days after action by the commission and a hearing or petition therefor under the statutes of Illinois appeal lies to the circuit court of Sangamon County, the seat of the commission, and from its decision to the supreme court within sixty days.[44] Similar

[31] *Laws 1913*, c. 145, sec. 18, adding sec. 22 to 1911, c. 164.
[32] *Laws 1911*, c. 195, sec. 38.
[33] Const., art. XI, sec. 7.
[34] *Laws 1911*, p. 549, sec. 33.
[35] Const., art. 9, sec. 20.
[36] *Laws 1912*, c. 795, sec. 34.
[37] *Laws 1908*, c. 116, sec. 12.
[38] Const., sec. 156.
[39] *Acts 1913*, c. 9, sec. 16.
[40] *Pub. acts 1911*, c. 128, as amended 1913, c. 225.
[41] *Code 1910*, secs. 2625, 2668.
[42] *Acts 1907*, sp. sess. no. 17, sec. 15.
[43] *Laws 1912*, c. 90, sec. 67.
[44] *Laws 1913*, p. 459, secs. 68, 69.

provisions for appeal to the court of the county in which the commission sits and thence to the supreme court of the state are made in Louisiana,[45] Pennsylvania,[46] Tennessee[47] and Wisconsin.[48]

In Indiana the appeal lies within sixty days to the court of any county in which the order is operative and thence within sixty days to the supreme court. A transcript of the evidence and of all the proceedings of the commission, as in most states, constitutes the record on appeal and the commission is required to file a certified copy of such transcript with the clerk of the court before the trial. The answer of the commission to the complaint or petition on appeal must be filed ten days after it is served with notice of the appeal, and all such actions are given precedence over other civil cases. If evidence is introduced in the trial on appeal which the court finds to be different from that considered by the commission or additional thereto, unless by agreement the parties stipulate to the contrary, the court must transmit a copy of such evidence to the commission and stay court proceedings for fifteen days. After considering such evidence the commission may sustain, modify or revoke its order and must report its action thereon to the court in ten days. The judgment of the court is then rendered on the case as modified, if any, by the commission.[49] Similar provisions as to additional or different evidence being transmitted to the commission, pending the consideration of which the court stays its proceedings, is made by statute in the District of Columbia,[50] Maryland,[51] Michigan,[52] Montana,[53] Nevada,[54] New Hampshire,[55] Oregon[56] and Wisconsin.[57]

Where new or different evidence is discovered in Pennsylvania the case may be remanded to the commission.[58] In this state, also,

[45] Const., art. 285.
[46] *Laws 1913*, no. 854, art. VI, sec. 17.
[47] *Acts 1913*, c. 32, sec. 13.
[48] *Stats. 1911*, sec. 1797 M–64.
[49] *Acts 1913*, c. 76, secs. 69–83.
[50] Appropriation act, March 4, 1913, sec. 8.
[51] *Ann. code 1911*, art. 23, sec. 458.
[52] *Pub. acts 1913*, no. 206, sec. 16.
[53] *Laws 1913*, c. 52, sec. 26.
[54] *Rev. laws 1912*, sec. 4564.
[55] *Laws 1913*, c. 145, sec. 18, adding section 22 to 1911, c. 164.
[56] *Laws 1911*, c. 279, sec. 56.
[57] *Stats. 1911*, c. 9, sec. 1797 M–67.
[58] *Laws 1913*, no. 854, art. VI, sec. 25.

it is interesting to note, the party taking the appeal must make affidavit that it is not taken for the purpose of delay but in the belief that injustice has been done. In Illinois, if the commission refuses to receive proper evidence, the court must remand the case to the commission with instructions to receive the same and enter a new order based upon all the evidence.[59] In Massachusetts a petition for appeal must be accompanied by a certificate of opinion that the case is a proper one for judicial inquiry and that the appeal is not intended for delay, and in the event the court finds to the contrary it shall assess double costs upon such appellant.[60]

The effectiveness of the orders of the commission and the extent of its control are largely determined by the conclusiveness of its findings and the validity of its orders pending appeals taken therefrom. For the same reasons and practically to the same extent that as a matter of evidence on appeal presumptions are indulged in favor of the action of the commission, their orders are generally not suspended while an appeal for judicial review is pending except on motion of the commission or by the court after notice and the giving of sufficient bond. For the commission to be most efficient and of the greatest practical value many of its orders and regulations issued after due investigation must become and remain effective with the final disposition of the commission. The necessary delay attending reviews by the courts and their lack of time and opportunity for investigating situations at first hand and as a current operating concern constitute at once the occasion and the chief reason for commission control. Suspending their orders pending appeals and while the same are being reviewed by the different courts interferes materially with the effectiveness of the commission, detracts from the validity of its action and often postpones indefinitely the enjoyment of the results of its investigations and findings.

By constitutional provision as well as statutory enactment in Arizona the rules, regulations, orders and decrees of the commission remain in force pending the decision of the courts.[61] In Florida it is expressly provided by statute that all orders, judgments or decrees of inferior courts in favor of the commission shall remain effective

[59] *Laws 1913*, p. 459, sec. 68.
[60] *Acts 1913*, c. 784, sec. 27.
[61] Const., art. XV, sec. 17; *Laws 1912*, c. 90, secs. 66–68.

until finally disposed of by the appellate court.[62] The constitution of Louisiana provides also that orders of the commission shall remain in force until set aside by the final judgment of a court of competent jurisdiction.[63] In Montana all rates fixed by the commission remain in full force and effect until final determination by the courts having jurisdiction,[64] and similar provision is made by statute in Nevada[65] and North Dakota.[66] When a rate which has been effective for a year or more is advanced, the order of the commission, reinstating the former rate in whole or in part, may not be suspended pending the final determination of the matter by the courts according to the provisions of the statutes in Illinois[67] and in Washington.[68]

In Connecticut, however, appeals supersede the order or decision appealed from as a rule, although the court may order to the contrary if the appeal is for purposes of delay, or if justice, public safety or expediency may require;[69] and this same provision is made by statute in Rhode Island;[70] while in Tennessee the rate, rule, order or regulation is suspended only in case legal proceedings are instituted within ten days, and then only upon injunction issued after notice and subject to large penalties if procured in bad faith.[71]

As a general rule in most jurisdictions having commissions their orders and regulations may be enjoined by the courts after a hearing and notice upon good cause shown and the giving of sufficient bond to cover costs and damages resulting in case the action for injunction was not well founded and the order is finally sustained; but the fact that a writ of appeal or review is pending does not suspend the order or regulation. In addition to the ordinary cost bond which is generally required as a condition of granting an injunction and suspending the order of the commission, the statutes in a number of jurisdictions having commissions, provide for the giving of a *super-*

[62] *Gen. stats. 1906*, sec. 2923.
[63] Const. art. 286, as amended 1908.
[64] *Laws 1913*, c. 52, sec. 26.
[65] *Rev. laws 1912*, sec. 4546.
[66] *Rev. codes 1905*, sec. 4351.
[67] *Laws 1913*, p. 459, sec. 71.
[68] *Laws 1911*, c. 117, sec. 82.
[69] *Pub. acts 1911*, c. 128, sec. 33.
[70] *Laws 1912*, c. 795, sec. 35.
[71] *Acts 1913*, c. 32, sec. 13.

sedeas or suspending bond conditioned and sufficient in amount to insure the prompt and complete refunding to all parties entitled thereto of all charges or rates for service paid in excess of the rate fixed by the commission and sustained by the courts on review. Verified accounts showing the amount of such excess rates and from whom received and to whom payable are often required of all parties as a condition for the suspension of any order or rate regulation of the commission, as is expressly provided in California,[72] Colorado,[73] Idaho,[74] Illinois,[75] Missouri,[76] Nebraska,[77] Ohio,[78] Oklahoma,[79] Oregon,[80] Pennsylvania,[81] South Dakota[82] and Washington.[83] In North Carolina the additional amount collected because of the excess rate being in effect must be paid to the state every three months.[84] In New Hampshire the conditions for securing the repayment of the amounts received under the excessive rates to the parties originally paying the same are fixed by the court, and a failure to make such repayments promptly as provided by the court is punishable as a contempt of court.[85]

The effectiveness of the control of municipal public utilities by state commissions is largely determined by the attitude of the courts in their construction of the public utility acts and in their review of commission findings and orders on appeal. That public utility commissions are practical business necessities and entirely consistent with constitutional rights has been fully recognized by all the courts which have been called upon to construe these statutory enactments, and their decisions freely admit that such state commissions are necessary administrative agencies and furnish the most satisfactory

[72] *Stats. 1911*, 1st ex. sess., c. 14, sec. 68.
[73] *Laws 1913*, c. 127, sec. 51.
[74] *Laws 1913*, c. 61, secs. 63–64.
[75] *Laws 1913*, p. 459, sec. 71.
[76] *Laws 1913*, p. 556, sec. 112.
[77] *Stats. 1911*, sec. 10655.
[78] *Laws 1913*, p. 804, secs. 37–41.
[79] Const., art. 9, sec. 21; *Laws 1913*, c. 10, sec. 3.
[80] *Laws 1911*, c. 279, sec. 55.
[81] *Laws 1913*, no. 854, art. VI, sec. 19.
[82] *Laws 1913*, c. 312, sec. 5.
[83] *Laws 1911*, c. 117, sec. 87.
[84] Rev. 1905, sec. 1082.
[85] *Laws 1913*, c. 145, sec. 18; adding sec. 22 to 1911, c. 164.

solution of the many intricate and comprehensive business questions that are constantly arising in increasing numbers in connection with the regulatio and control of public utilities which everyone now regards as natural monopolies and every-day business necessities.

The federal court in the case of Des Moines Gas Company *vs.* Des Moines[86] frankly recognized the necessity and practical advantage of this method of regulation and control by conceding that:

> Much of this kind of litigation, and practically all of the expense, would be avoided if Iowa, like so many of the other, including some neighboring, states, had an impartial and city non-resident commission or tribunal, with power to fix these rates at a public hearing, all interested parties present, with the tribunal selecting its own engineers, auditors and accountants.

The court of New York concurring with those of many other jurisdictions expressed unqualified approval of the plan of commission control in the case of Saratoga Springs *vs.* Saratoga Gas, etc., Company[87] in saying:

> That the most appropriate method (speaking from a practical, not necessarily constitutional, point of view) is the creation of a commission or body of experts to determine the particular rates, has been said several times in the opinions rendered by the supreme court of the United States in the various railroad commission cases and in those of state courts.

And in the recent case of People ex rel. New York Edison Company *vs.* Willcox[88] this same court said:

> That law (i.e. public service commissions law) was enacted in response to a pronounced and insistent public opinion, and was a radical and important modification of the relations and policy of the people toward the corporations, which are its subjects. Its paramount purpose was to protect and enforce the rights of the public. It made the commission the guardians of the public by enabling them to prevent the issue of stock and bonds for other than statutory purposes, or in appreciable and unfair excess of the value of the assets securing them, and to prevent also unneeded or extortionate competition, or indifferent and unaccommodating methods of operation, or oppressive or discriminating charges or rates. It provides for a regulation and control which were intended to prevent, on the one hand, the evils of an unrestricted right of competition, and, on the other hand, the abuses of monopoly.

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[86] 199 Fed. 204.
[87] 190 N. Y. 562; 83 N. E. 693; 18 L. R. A. (N. S.) 713.
[88] 207 N. Y. 86; 100 N. E. 705.

The supreme court of Wisconsin has also fully sustained and very frankly approved the plan of commission control in the case of Calumet Service Company *vs.* Chilton,[89] where the court says:

> Control by the trained impartial state commission, so as to effect the one supreme purpose, i.e., the best service practicable at reasonable cost to consumers in all cases and as near a uniform rate for service as varying circumstances and conditions would permit [is] a condition as near the ideal probably as could be attained.

This uniformly favorable attitude of our courts towards the principle of commission control is pertinent and deserves consideration in connection with their holding that the right of appeal and judicial review is statutory and therefore subject to the will of the legislature within the constitutional limitations of due process and equal protection of the law with respect to the preservation of property and contract rights. The nature and extent of the right to appeal from the commission's action, together with the reason for the rule, are well expressed in the case of Minneapolis, etc., Company *vs.* Railroad Commissioners[90] where the court said:

> Being purely the creature of statute, the right of appeal from the decision of the commission to the district court, if it exists, must be found in express provisions of the act. . . . . But it is not to be presumed that the legislature intended to turn the courts into appellate railroad commissions, which should retry the facts, and pass upon matters of a purely administrative nature, relating to the maintenance and operation of railways, and involving merely questions of policy affecting the security or convenience of the public. Indeed, if the act assumed to confer upon the courts jurisdiction over matters so entirely foreign to the judicial function, it would be of doubtful validity to say the least of it.

There being no inherent right of appeal, the nature and extent of the power and authority of such commissions to issue orders, from which there is actually no such right, are concisely stated in the case of Interstate Commerce Commission *vs.* Union Pacific Railway Company[91] as follows:

> The orders of the commission are final unless (1) beyond the power which it could constitutionally exercise, or (2) beyond its statutory power, or (3)

[89] 148 Wis. 334; 135 N. W. 131.
[90] 44 Minn. 336; 46 N. W. 559.
[91] 222 U. S. 541.

based upon a mistake of law. But questions of fact may be involved in the determination of questions of law, so that an order, regular on its face, may be set aside if it appears that (4) the rate is so low as to be confiscatory and in violation of the constitutional prohibition against taking property without due process of law, or (5) if the commission acted so arbitrarily and unjustly as to fix rates contrary to evidence, or without evidence to support it, or (6) if the authority therein involved has been exercised in such an unreasonable manner as to cause it to be within the elementary rule that the substance, and not the shadow, determines the validity of the exercise of the power. . . . . "The findings of the commission are made by law *prima facie* true and this court has ascribed to them the strength due to the judgments of a tribunal appointed by law and informed by experience. Its conclusion of course is subject to review, but, when supported by evidence, is accepted as final."